



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERICHO**

**ELC SUIT NO. 16 OF 2021**

**FRANKLIN LANGAT.....PLAINTIFF/APPLICANT**

**VERSUS**

**JULIUS OSANGA ABUTI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**THE CHAIRMAN, BURETI LAND CONTROL BOARD.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**THE LAND REGISTRAR, KERICHO.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Coming up before me for determination is an application dated the 25<sup>th</sup> June May 2021 wherein the Applicant herein seeks substantive orders of stay of proceedings in Sotik SPM MCE & L No 12 of 2021 in relation to the suit properties being Kericho/Cheborge/1350 and 1348.
2. The application is supported on the grounds on the face of it and a supporting affidavit of Franklin Langat, the Applicant herein, sworn on the 25<sup>th</sup> June 2021.
3. The main issues upon which the Application is brought is that the trial Court at Sotik has no jurisdiction to try the matter which is also pending before this court and in which the Applicant has challenged the title issued by the 3<sup>rd</sup> Respondent to the 1<sup>st</sup> Respondent.
4. The Applicant's claim is that the suit property is a subdivision of an original land parcel No. Kericho/Cheborge/486 which was subdivided pursuant to Succession Cause No. 297 of 2015 thus giving rise to No. Kericho/Cheborge/1284 (amongst others) which land was subsequently registered to the Applicant's father one Samwel Kiplangat Cheruiyot. That thereafter, the 1<sup>st</sup> Respondent, with the help of the 2<sup>nd</sup> Respondent fraudulently caused a sub-division of No. Kericho/Cheborge/1284 and 1285 which gave rise to No. Kericho/Cheborge/1350 and 1348 which parcels of land were then registered in the name of the 1<sup>st</sup> Respondent and for which he has filed suit being Sotik SPM MCE & L No 12 of 2021, claiming ownership. The Applicant then filed suit before this court challenging the validity of the titles issued by the 3<sup>rd</sup> Respondent to the 1<sup>st</sup> Respondent.
5. The application is opposed by the 1<sup>st</sup> Respondent through his Notice of Preliminary Objection dated the 4<sup>th</sup> August 2021 to the effect that the suit was scandalous, frivolous and vexatious and an abuse of the process of the court, the Applicant having no capacity to institute the same. That secondly, the Applicant's suit did not disclose a reasonable cause of action and third, that the Applicant could not purport to challenge the jurisdiction of the lower court and/or stay the proceedings thereto as he was not party to the said suit.
6. The Hon Attorney General representing the 2<sup>nd</sup> to 4<sup>th</sup> Respondents also opposed the application through their Notice of Preliminary Objection dated the 9<sup>th</sup> August 2021 to the effect that the Applicant lacked the locus standi to lodge both the suit and the application. That secondly, the application fell short, based on the doctrine of res-subjudice and pursuant to the provisions of Section 6 of the Civil Procedure Act, there being a similar suit based on the same subject matter, which was pending determination before the Sotik SPM Court in MCE & L No 12 of 2021.
7. On the 29<sup>th</sup> September 2021, the court directed that both the Preliminary Objections be canvassed in the first instance through written submissions.

## **1<sup>st</sup> Respondent's submissions**

8. The 1<sup>st</sup> Respondent's written submission in opposition to the Applicant's application and in support of the preliminary objection, framed their issues for determination as follows;

- i. Whether the Plaintiff/Applicant has legal capacity to institute the present suit
- ii. Whether the application falls short on the doctrine of res sub Judice
- iii. Whether the application falls short on the doctrine of subsidiarity
- iv. Who should bear the costs of the application and the suit

9. On the first issue for determination, the 1<sup>st</sup> Respondent submitted that their preliminary objection was raised on the issue of locus standi to the effect that whereas the Plaintiff/Applicant sought to stay the proceedings pending in Sotik SPM Court in MCE & L No 12 of 2021 in respect of the subject matter, yet he was not a party and /or privy to the proceedings in the lower Court.

10. That the 1<sup>st</sup> Respondent, being the absolute proprietor of the respective parcels of properties comprised in No. Kericho/Cheborge/1350 and 1348, his titles were protected by the law. That the Applicant herein was a stranger with no capacity to institute the suit as he had no any proprietary rights. That the suit was incompetent and ought to be struck out since a person without the locus standi had no right of audience before court even where he had a case worth listening to. Reliance was placed on the decided case of the **Alfred Njau & Others vs City council of Nairobi (1982) KLR 229**.

11. On the second issue for determination as to whether the application fell short for being averse to the doctrine of res sub Judice, the 1<sup>st</sup> Respondent relied on the provisions of Sections 5 and 6 of the Civil Procedure Act to submit that where there was an issue/suit pending in a court of law for adjudication between the same parties, any other court was barred from trying that issues so long as it was pending. That in the present circumstance, there was no dispute that indeed there was a suit pending before the Sotik SPM Court in MCE & L No 12 of 2021 in respect of the same subject matter and same parties and for which the Applicant had sought for stay. That the suit property in the matter related to No. Kericho/Cheborge/1350 and 1348, registered in the 1<sup>st</sup> Respondent herein and for which the Applicant sought to represent undisclosed 'Cousins' who were the Defendants and /or interested parties therein. That multiplicity of suits between the same parties and against the same subject matter ought to be avoided for they clogged the wheels of justice and held up resources that would have been committed to filing fresh matters thus contributing to the backlog of cases.

12. That it was not the form in which the suit was framed that determined whether it was sub judice, but rather, the substance of the suit and there could not be any justification in two cases running parallel to each other.

13. The 1<sup>st</sup> Respondent's submission as to whether the application fell short of the doctrine of Subsidiarity was to the effect that public functions ought to be exercised as close as possible to the citizen and that only where the closest authority was not in a position to perform such function effectively would the function be allocated to another higher level. That the Sotik Law court was the closest authority clothed with jurisdiction to try the matter and therefore the application should fail.

14. Finally the 1<sup>st</sup> Respondent submitted that pursuant to the provisions of Order 51 of the Civil Procedure Rules, they should be awarded costs.

## **2<sup>nd</sup> -4<sup>th</sup> Respondents' Submissions.**

15. Similarly the 2<sup>nd</sup> -4<sup>th</sup> Respondents in opposition to the Applicant's application and in support of their own Preliminary Objection which was predicted on two main grounds to wit that the Applicant lacked the locus standi to lodge the suit and that the said suit fell short pursuant to the doctrine of res sub Judice as provided for by the provisions of Section 6 of the Civil Procedure Act, submitted that although the Applicant herein, in his plaint sought that the court makes a declaration that the suit properties No. Kericho/Cheborge/1350 and 1348, registered to the 1<sup>st</sup> Respondent be canceled and reverted to the names of the previous registered proprietors of No. Kericho/Cheborge/1284 and 1285 being Samwel Kiplagat Cheruiyot and Joshua Kiprono Cheruiyot, yet these persons were parties in the proceedings before the Sotik Law court. That the Applicant's capacity to file suit before this court therefore on behalf of Samwel Kiplagat Cheruiyot and Joshua Kiprono Cheruiyot was neither anchored on the law of trust nor his capacity as a guardian of the alleged proprietors and therefore he had no locus standi since the alleged proprietors of the suit properties were capable of instituting suit under their respective names given that they were already parties to the suit filed in the Sotik court where they responded under their names.

16. The 2<sup>nd</sup> -4<sup>th</sup> Respondents submitted further and in reference to the provisions of Section 6 of the Civil Procedure Act, that the suit before this court fell short on the doctrine of sub Judice. That the Applicant by his own admission had confirmed that indeed there existed a suit filed by the 1<sup>st</sup> Respondent in the Sotik SPM Court in MCE & L No 12 of 2021 touching on the ownership of the suit properties. That the Applicant had further conceded in his pleadings that the alleged owners of the suit properties, Samwel Kiplagat Cheruiyot and Joshua Kiprono Cheruiyot had raised a Preliminary Objection challenging inter alia, the pecuniary jurisdiction of the lower court. That the net effect was that the lower court case be deemed to be properly before a court of competent jurisdiction and therefore for the Applicant to come to this court seeking prayers to stay the lower court case was draconian, frivolous, an abuse of the court process and mischievous and intended to have a second bite at the cherry. That the application was aimed at unfairly tilting the scales of justice in his favour regardless of the outcome of the preliminary objection already raised before the lower Court, which is pending determination.

17. The Respondents sought for both the Application and suit be dismissed with costs.

## Determination.

18. I have considered the application herein, wherein the Applicant seeks substantive orders of stay of proceedings in Sotik SPM MCE & L No 12 of 2021 which is in relation to the suit properties No. Kericho/Cheborge/1350 and 1348. I note that despite the Applicant having been directed on the 26<sup>th</sup> October 2021 and on the 24<sup>th</sup> November 2021 to file and serve their written submissions, as at the time I write this ruling, the orders have not been complied with. That notwithstanding, having reviewed the pleadings and submissions by the parties, it is clear and not in dispute that indeed there is a matter pending before the Sotik SPM Court in MCE & L No 12 of 2021 where the parties thereto are the Plaintiff-Julius Osanga Abuti (the 1<sup>st</sup> Respondent herein) vs Geoffrey Kitur, Beatrice Chemutai, Petronilla Bamnchiri, Gideon Langat, Patrick Koech, Willy Kilel, Hillary Yegon, Samwel Rugut and Geoffrey Mutai as Defendants. Both Samwel Kiplagat Cheruiyot and Joshua Kiprono Cheruiyot have been joined as interested parties.

19. There is also no dispute herein that the subject suit in the Magistracy court is in relation to properties No. Kericho/Cheborge/1350 and 1348, both registered to the 1<sup>st</sup> Respondent who has sought that Defendants herein above be restrained from trespassing on the said suit lands.

20. It is also not in doubt that the Applicant herein has filed a suit in this court seeking a declaration that the said suit lands having allegedly been obtained fraudulently by the 1<sup>st</sup> Defendant, their titles be cancelled and reverted back as properties No. Kericho/Cheborge/1284 and 1285 as previously registered to Samwel Kiplagat Cheruiyot and Joshua Kiprono Cheruiyot respectively who are interested parties in Sotik SPM Court in MCE & L No 12 of 2021.

21. Based on the above outline, the fact that the Respondents herein have raised similar points of Preliminary Objection to the effect that the Applicant has no locus standi to bring the present application seeking stay of proceedings in the lower Court, and secondly that the subsequent suit is sub judice by virtue of the existing suit in Sotik SPM Court in MCE & L No 12 of 2021, this court is called upon to determine whether the said twin Preliminary Objection can stand.

22. I have given due consideration to the arguments and the authorities cited, I find that the Respondents have raised weighty issues that go to attack the jurisdiction of the Court to try this matter.

23. The principles in **Mukisa Biscuit Manufacturing Co. Ltd. vs West End Distributors Ltd. (1969) EA 696** are clear that for a Preliminary objection to be sustained, it must consist of a point(s) of law which if argued is capable of disposing of the suit. The Respondents herein have argued that the Applicant cannot bring this application or suit because he does not have the locus standi and secondly that the Applicant's suit and application are statute barred for being subjudice.

24. In **Alfred Njau & Others v City Council of Nairobi [1982-88] 1 KAR 229** the Court of Appeal gave meaning to the term locus-standi by stating:

“.....to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”

25. From the Application and Complaint herein filed, I note that the Applicant was neither a party to the proceedings in the lower court nor a proprietor to the suit parcels of land No. Kericho/Cheborge/1350 and 1348 and that the titles he wishes to have cancelled and reverted to No. Kericho/Cheborge/1284 and 1285 are registered to third parties. That the same were previously registered to Samwel Kiplagat Cheruiyot and Joshua Kiprono Cheruiyot respectively, who are interested parties in Sotik SPM Court in MCE & L No 12 of 2021. There having been no explanation given by the Applicant regarding his capacity to file the present Application and/or suit, I find that his pleadings are not anchored in any law and therefore he lacks the locus standi to file the same.

26. Indeed the Court of Appeal authoritatively delivered itself on the issue of locus standi in **Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another (1982-99) 1 KAR, Morjaria v Abdalla [1984] KLR 490** and in **Trouistik Union International & Another v Jane Mbeyu & Another (2008) IKLR (G&F) 730 to the effect that Locus standi** is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue or be sued renders the suit incompetent.

27. The issue of *locus standi* being a point of law goes to the root of any suit, its absence therefore renders a suit fatally defective. Lack of locus standi therefore cannot be termed as a mere technicality and the provisions of Article 159 (2) (d) of the Constitution cannot in the present circumstance salvage this suit.

28. The Respondents have also raised the issue of this matter being sub judice the proceedings in Sotik SPM Court in MCE & L No 12 of 2021. I also note that the 1<sup>st</sup> interested party has raised a Preliminary Objection as to the jurisdiction of the said Magistrates court. I am therefore left to wonder as to why the Applicant who had no locus standi rushed to this court raising the same issue over the same subject matter instead of awaiting the outcome of the Magistrates' court's verdict on the objection raised.

29. The provisions of section 6 of the *Civil Procedure Act* provides for stay of suits as follows:-

“No Court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other Court having jurisdiction in Kenya to grant the relief claimed”.

30. I find that since there is a suit still pending before the Sotik Senior Principle's Court, the provisions of Section 6 of the *Civil Procedure Act* have been properly invoked. The Preliminary objection on this aspect herein succeeds.

31. In totality therefore I find that the Respondents have ousted the Applicant's application and suit herein. Their preliminary objections are herein allowed with the result that I dismiss the Applicant's application dated the 25<sup>th</sup> June 2012. I also proceed to strike out his suit of a similar date, with costs to the Respondents. The interim orders are vacated accordingly.

**DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 25<sup>TH</sup> DAY OF JANUARY, 2022**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**